Supreme Court, U.S.
FILED
JAN 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

(11) (10)

Nos. 86-179, 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, et al.,
Appellants,

v.

CHRISTINE J. AMOS, et al.,
Appellees.

On Appeal From The United States District Court For The District Of Utah

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

18 pp

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment but also involve the preservation of the separation of church and state so that each may effectively carry out their proper roles in society with the minimum of interference from the other.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in official capacity, and some on a lay basis, but all recognize the importance of preserving a judicial course that maintains the autonomy and freedom of religious bodies.

SUMMARY OF ARGUMENT

The action of Congress in exempting religious institutions from the operation of Title VII with respect to the exercising of a religious preference in hiring does not resemble any of the state actions previously held by this Court to violate the Establishment Clause. The exemption does not sponsor or lend even indirect financial support to religious institutions, nor does it involve the state in religious affairs. The district court has failed to explain how the exemption advances religion.

This Court has consistently recognized religious exemptions as legitimate means by which Congress may accommodate religious exercise. Rather than invalidate exemptions, this Court has specifically upheld exemptions far more beneficiai to churches than that involved here against Establishment Clause challenges, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), and has strongly implied that in sensitive areas the lack of such exemptions could itself violate the Establishment Clause, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

Contrary to the results reached by the district court, Congress may go beyond the minimal requirements of the Free Exercise Clause in accommodating religion. *Walz*, *supra*. What Congress has done in § 702 is to recognize in a limited manner the delicate problem of prohibiting religious institutions from using religious considerations

in their employment decisions. Congress did not exempt religious institutions from the prohibition against race, sex, and national origin discrimination. It simply decided that in the narrow area of religious preference, it was not comfortable attempting to make the fine distinctions necessitated by drawing the line where the district court has chosen to draw it.

ARGUMENT

I. THE RELIGIOUS EXEMPTION IN TITLE VII ADVANCES NONE OF THE EVILS THE ESTABLISHMENT CLAUSE WAS DESIGNED TO PROTECT AGAINST.

Since it was first passed, § 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, has made provisions for allowing religious institutions to exercise a religious preference in hiring their employees. In 1972 § 702 of the Act was amended to provide that religious institutions could exercise this religious preference without the requirement that the employee be engaged in religious activity.[1]

In its decision below the district court has ruled that this sensitivity on the part of Congress to the autonomy of religious institutions amounted to an unconstitutional establishment of religion. The ruling of the district court

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[1] Section 702 in its present form reads as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Prior to the 1972 amendment the word "religious" was contained in the text immediately prior to the word "activities."

has no support in this Court's holdings on the Establishment Clause, and in fact goes against the clear weight of the Court's prior decisions. To expand the prohibition of the Establishment Clause to the extreme point taken by the district court "would be to find in the Constitution a requirement that the government show a callous indifference to religious groups," a position rejected by this Court long ago in *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

The district court correctly noted that in order to find a violation of the Establishment Clause "[t]he aid must further the evils against which the establishment clause was designed to protect—'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411, 25 L.Ed.2d 697 (1970)." *Amos* v. *Corporation of the Presiding Bishop (Amos I)*, 594 F.Supp. 791, 820 (D. Utah 1984) (App. 58A).[2] But the court completely failed to articulate how the existing exemption in § 702 of Title VII furthers any of these evils.

The exemption cannot be said to even remotely lend even indirect financial support to religious institutions. It does not exempt such institutions from any payroll taxes, the payment of minimum wages, or any other expense of employment. Just as clearly, an exemption does not further active involvement of the sovereign in religious activity. Indeed, as everyone admits, the purpose of the exemption is to do the opposite. Finally, there is no sponsorship. No symbolic union is created between the gov-

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[2] Citations to (App. ____) refer to pages in the Appendix to the Jurisdictional Statement filed by the appellants.

ernment and religious institutions by this deliberate distancing of the two.

Also, the government does not by force of law impose unyielding religious considerations on the conduct of all businesses as in *Estate of Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 (1985). All the government has done is to allow religious institutions to make religious considerations in hiring without the imposition of government restraints.

II. THIS COURT HAS APPROVED, NOT INVALIDATED, RELIGIOUS EXEMPTIONS.

The district court relies on the statement of the Court in *Wisconsin* v. *Yoder* 406 U.S. 205, 220-221 (1972) (a case in which an exemption was held to be required by the First Amendment), that, "the Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." However, the significance of that statement with respect to the facts of this case pales in light of the decisions of this Court upholding other religious exceptions. Perhaps the two most vital obligations of citizenship are the payment of taxes and military service. Yet this Court has upheld religious based exceptions to both of these against Establishment Clause challenges in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970), and *Arver* v. *United States [Selective Draft Law Cases]*, 245 U.S. 366 (1918), respectively.

This Court's decision in *Walz* is most significant with respect to this case. As in this case, the exception in *Walz* was granted to religious institutions. Despite the unmistakable financial benefits of the exemption from property taxes involved in that case, the Court found no Establishment Clause violations.

> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz, 397 U.S. at 676-677. It is just this sort of benevolent neutrality that the Congress was exercising when it included the exemption at issue here in Title VII. Congress decided to simply allow churches to decide whether it was in their own best interest to hire employees of a particular faith.

The district court attempted to distinguish *Walz* by pointing to factors present in that case and absent here. First, it attaches great significance to the fact that in *Walz* the state had provided exemptions to a wide range of nonprofit organizations. But this cannot alter the fact that churches under the New York law received exemptions specifically because their property was used for "religious" purposes and not because they fit within some broader definition of charitable purpose. In fact, the Court in *Walz* took pains to emphasize that there was no need to justify the tax exemption for churches on the social welfare services that they might perform. *Id.* at 674.

Next, the district court stresses the long history of property tax exemptions pointed out by the Court in *Walz* and notes a lack of such historical justification in this case. *Amos I*, 594 F.Supp. at 824 (App. 66A-67A). Two points should be made here. First, the Court in *Walz* acknowledged that a long history of existence could not justify a practice if it truly did violate the Establishment Clause. Second, there is a long history of churches being free to

exercise religious preference in the hiring of employees. In fact, there has never been a time in this country when they could not exercise such preference. Prior to the passage of Title VII, no government restraints existed on their hiring policies.

In *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981), the Court was called upon to interpret the exemptions for religious institutions contained in the Federal Unemployment Tax Act, 26 U.S.C. § 3309. The Court gave this exemption a broader interpretation than that adopted by the Secretary of Labor. It held that the exemption covered all employees hired by a church or convention of churches, not just those engaged in religious activity or working in an actual house of worship.

The parallels between the broader exemption approved by the Court in *St. Martin* and the broader exemption struck down here by the district court are obvious. Further, the exemption in *St. Martin* was available only to churches or conventions or associations of churches and to ordained ministers. Congress had specifically eliminated exemptions for a wider range of nonprofit organizations. Yet the Court expressed no concern about the exclusivity of the exemption in *St. Martin*.

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Court interpreted the National Labor Relations Act to exempt religious schools from its coverage. As in *St. Martin*, the Court acknowledged its awareness of the constitutional implications of its interpretation.

The exemption found by the Court in *Catholic Bishop* was broader than that involved here. The Court in *Catholic Bishop* found religious schools completely exempt from all NLRB jurisdiction. Here, § 702 does not com-

pletely exempt religious institutions from all EEOC jurisdictions. The EEOC still has jurisdiction over religious institutions with respect to race and sex discrimination and all other violations of Title VII. The only relief given to religious institutions is in the narrow area of religious preference.

Despite the broader exemption in *Catholic Bishop*, the Court expressed no fear that the exemption would violate the Establishment Clause. On the contrary, the Court expressed fear that the lack of an exemption would present Establishment Clause problems.

In still other cases this Court has noted with approval government policies of accommodating religious exercise through exemption. In *Braunfeld* v. *Brown*, 336 U.S. 599 (1961), while refusing to strike down Sunday closing laws, the Court noted with approval the policy of some states to include religious exemptions in their Sunday closing laws. In *United States* v. *Lee*, 455 U.S. 252 (1982), the Court noted that there is a religious exemption from social security taxes for self-employed persons contained in 26 U.S.C. § 1402(g). The appellees, in their motion to affirm, cite *Bowen* v. *Roy*, 106 S.Ct. 2147 (1986); *Goldman* v. *Weinberger*, 106 S.Ct. 1310 (1986); *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 105 S.Ct. 1953 (1985); *United States* v. *Lee*, 455 U.S. 252 (1982); and *Welsh* v. *United States*, 398 U.S. 333 (1970), as examples of cases where the Court has invalidated exemptions. This is simply not what those cases are about. In those cases, the Court refused to require exemptions where none existed on the basis of the Free Exercise Clause. In none of those cases was an existing exemption struck down as a violation of the Establishment Clause.

The unavoidable import of this Court's decisions in this age of ever expanding government regulation is that

religious exemptions are a proper and vital method by which legislative bodies balance fundamental First Amendment values with other governmental interests. "[T]he Establishment Clause embodied the Framers' conclusion that government and religion have discreet interests which are mutually best served when each avoids too close a proximity to the other." *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 259 (1963) (Brennan, J., concurring).

III. CONGRESSIONAL ACCOMMODATION OF RELIGION MAY EXCEED THE MINIMAL REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

"The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz*, 397 U.S. 673. Despite this straightforward assertion by the Court that the government may make accommodations to religion beyond the minimum required by the Free Exercise Clause, the district court's analysis draws the line limiting state accommodation precisely at the point where it perceives possible free exercise burdens to end. "Furthermore, the abolution of the governmental exclusion for religious organizations' religious discrimination in secular, nonreligious activities does not present any conflict with the free exercise clause. Consequently, the principle of accommodation espoused in *Walz* has little relevance here." *Amos I*, 594 F.Supp. at 824 (App. 67A).

The greater part of the district court's analysis of the primary effect of the exemption under the tripartite *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), test is actually an analysis of whether the narrower exemption favored

by the district court would violate the appellants' free exercise rights. Finding that the slightly broader exemption presently contained in § 702 of Title VII is not required by the Free Exercise Clause, the district court jumps to the conclusion that the Establishment Clause is violated by such an exemption.

The district court also faults the exemption for not being facially neutral. *Amos I*, 594 F.Supp. at 824 (App. 66A). The court's point here is difficult to understand. The exemption is completely neutral as between competing religions. The only way it could be said to lack facial neutrality is in its treatment of religious institutions as opposed to secular institutions. That such a lack of "facial neutrality" would cause a constitutional problem makes no sense in view of the fact that the district court specifically approved a legislative purpose to accommodate religion. "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden." *Wallace* v. *Jaffree*, 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring).

As stated earlier, the district court fails throughout its lengthy opinion to articulate in what manner the exemption in § 702 of Title VII advances religion. The court simply states the following conclusion:

> Hence, the exemption contained in § 702, as applied to secular, non-religious activities, violates the establishment clause by granting religious organizations an exclusive authorization to engage in conduct which can directly and immediately advance religious tenets and practices.

Amos I, 594 F.Supp. at 825 (App. 70A). The idea that the Establishment Clause is violated by allowing churches to

advance religion is a perversion of the First Amendment. Churches exist for no other reason.

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. *Clauson*, 343 U.S. 306, 313-314 (1952).

IV. IT IS WITHIN THE COMPETENCE OF CONGRESS TO DECIDE TO ACCOMMODATE RELIGIONS IN THE MANNER THEY HAVE CHOSEN IN TITLE VII.

What Congress has done here is simply to decide that in exercising its powers under the Commerce Clause, it could best effectuate its legislative purpose without attempting to regulate an area as closely related to the religious purpose of sectarian institutions as the exercise of a religious preference in hiring. The wisdom of this congressional determination can best be seen in the elements in the application of the complex text devised by

the district court for determining which jobs involve religious activity. The court set out the test as follows:

> First, the court must look at the tie between the religious organization and the activity at issue with regard to areas such as financial affairs, day-to-day operations and management. Second, whether or not there is a close and substantial tie between the two, the court next must examine the nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial connection between the activity in question and the religious organization's religious tenets or matters of church administration and the tie under the first part of the test is close, the court does not need to proceed any further and may declare the activity religious. However, where the tie between the religious entity and activity in question is either close or remote under the first prong of the test and the nexus between the primary function of the activity in question and the religious tenets or rituals of the religious organization or matters of church administration is tenuous or non-existent, the court must engage in a third inquiry. It must consider the relationship between the nature of the job the employee is performing and the religious rituals or tenets of the religious organization or matters of church administration. If there is a substantial relationship between the employee's job and church administration or the religious organization's rituals or tenets, the court must find that the activity in question is religious. If the relationship is not substantial, the activity is not religious.

Amos I, 594 F.Supp. 799 (citation and footnote omitted) (App. 10A-11A).

Simply reading the test should make anyone extemely cautious of entering such a religious thicket. Congress chose to exercise such caution, and it is not for the courts

to force them to go. To enter requires one to examine the meaning and centrality of church doctrine. This can be seen by the application of the test made by the court. In *Amos I* the court determined that the Mormon belief and the desirability of physical exercise and the church's desire to provide for such exercise in an atmosphere that exemplifies those beliefs were not central to basic Mormon tenets. *Id.* at 801 (App. 16A). In *Amos II*, 618 F.Supp. 1013 (D. Utah 1985), the court interpreted Mormon scriptures in order to find that the church's social welfare activities were religious activities, 618 F.Supp. at 1024-1025 (App. 110A-111A). Finally, the court in *Amos II* determined that it would resolve a dispute as to whether it was necessary for church members only to manufacture sacred religious garments, *id.* at 1022, (App. 102A).

This court stated in *Presbyterian Church* v. *Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969), that "First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." The Court went on to rule that "[t]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role." *Id.* at 450. Even if administration of the district court's proposed test did not amount to a violation of the First Amendment, it can hardly be said that Congress' determination not to plunge the EEOC into such murky issues violated the Establishment Clause.

Sympathy for the plight of a long term loyal employee suddenly cast out of his job is quite understandable,

especially when the action appears arbitrary. It is not necessary for the Court to resolve the question of whether the Free Exercise Clause requires the exemption in § 702 to cover employees engaged in purely secular activities. We also express no opinion as to whether application of the exemption to employees in commercial enterprises in direct competition with secular enterprises simply on the basis of ownership by a religious institution would violate the equal protection rights of employees. We believe that the best solution to any possible societal problems caused by an overbroad application of the exemption lies with Congress. However, we firmly believe that resort to the Establishment Clause to remedy the plight of the appellees would work a terrible distortion of the entire body of Establishment Clause case law.

What this court said in *Zorach* v. *Clauson*, 343 U.S. at 314, is equally applicable here:

> This program may be unwise and improvident. . . . Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State.

CONCLUSION

For the reasons stated above, the decision of the District Court of Utah should be reversed.

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